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Supreme Court, U.S.
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No. 03-1717

IN THE
SUPREME COURT OF THE UNITED STATES

BRODERICK JONES,

Petitioner,

v.

REGINALD WILEY

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

When a police officer fabricates the evidence used to justify an arrest, and when that fabricated evidence (1) is the basis for the post-arrest determination of probable cause required by *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975), (2) is the foundation for a grand jury indictment, and (3) is the underpinning for the prosecutor's decision to continue a criminal prosecution for two years,

1. Whether an action for damages under 42 U.S.C. §1983 against the police officer who fabricated the evidence must be brought before the criminal charges have been resolved in favor of the wrongfully prosecuted person?

2. Does the unreasonable seizure arising from the arrest based on fabricated evidence continue until the criminal charges have been resolved in favor of the wrongfully prosecution person or does the unreasonable seizure end when the arrestee is formally charged with an offense?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner submits the following in response to the petition for writ of certiorari filed by petitioner Broderick Jones to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 22, 2004.[1]

STATEMENT

After he had been cleared of criminal charges, respondent Reginald Wiley filed an action for money damages under 42 U.S.C. §1983 against petitioner Chicago Police Officer Broderick Jones, and his employer, the City of Chicago.[2] Respondent alleged that he had been framed for a narcotics offense by petitioner Jones, (Complaint, par. 5), that Jones had concealed respondent's innocence from the prosecutors, and had thereby caused petitioner to have been "wrongfully prosecuted."[3] (Complaint, par. 6.) The prosecution continued until July of 2002, when all charges were dismissed.[4] (Complaint, par. 7.)

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1. The arguments advanced here are equally applicable to respondent's cross-petition for writ of certiorari, *Wiley v. City of Chicago,* No. 03-1687.

2. The City of Chicago is not a party to this petition but is a respondent in the cross-petition, No. 03-1687.

3. The complaint is reproduced in the appendix to the cross-petition, No. 03-1687, Pet.App. 17-18.

4. Although the complaint does not provide any details about the nature of the dismissal, the state court criminal docket shows that respondent was found not guilty at a bench trial. *People v. Wiley,* Circuit Court of Cook County, Illinois, No. 00-CR-1-2461001.

The district judge mistakenly assumed that there had not

In addition to bringing a wrongful prosecution claim against petitioner, respondent also sought to impose liability on the City of Chicago, alleging that respondent's misconduct was possible because of the municipality's deliberate indifference to the fabrication of evidence by its police officers. (Complaint, par. 8.) Petitioner sought damages for the violation of rights secured by the Fourth and Fourteenth Amendments, as well as damages for the Illinois tort of malicious prosecution. (Complaint, par. 9.)

Respondent filed an answer to the complaint, denying any wrongdoing. The City of Chicago moved to dismiss petitioner's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that respondent's only viable federal claim was for false arrest, and maintaining that this claim was barred by the statute of limitations because it had accrued when respondent was arrested.

Respondent argued in the district court that his claim was not for "false arrest," but was for "wrongful prosecution." (Plaintiff's Memorandum in Opposition to

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been a trial (Pet.App. 11a) and petitioner repeats this error, stating that charges against respondent were "dropped." (Pet. 2.) Respondent does not assert that undergoing a trial is an element of his cause of action and accordingly does not believe that the manner in which the charges were dismissed has any bearing on the questions presented in this case or in the cross-petition, No. 03-1687.

Motion to Dismiss, 3-6.) The district court disagreed, relying on the Seventh Circuit's decision in *Newsome v. McCabe,* 256 F.3d 747 (7th Cir. 2001) that the "effective holding" of *Albright v. Oliver,* 510 U.S. 266 (1994) (Pet.App. 11a) limited respondent's Fourth Amendment claim to one for false arrest, which was untimely because it had been filed after expiration of the statute of limitations. (Pet.App. 12a.)

In a timely motion to reconsider, respondent argued that the district court's holding was contrary to *Heck v. Humphrey,* 512 U.S. 477 (1994) because his wrongful prosecution claim arose from a police frame-up, a fact which, if accepted, would have undermined the criminal prosecution and could therefore not be brought until the criminal case had been resolved in respondent's favor. (Plaintiff's Rule 59 Motion to Amend Judgment, 2-3.) The district court refused to reconsider, applying the Seventh Circuit's "categorical approach" of *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892 (7th Cir. 2001) that all Fourth Amendment claims accrue upon arrest. (Pet.App. 15a-16a.)

On appeal, respondent provided further details about petitioner's alleged wrongdoing,[5] stating as follows:

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5. Caselaw in the Seventh Circuit encourages appellants to "hypothesize" facts in an appeal from an order granting a Rule 12(b)(6) motion to dismiss. See, e.g., *Stevens v. Umsted,* 131 F.3d 697, 705 (7th Cir. 1997); *Chavez v. Illinois State Police,* 251 F.3d 612, 648 (7th Cir. 2001).

> For several years, Chicago police officer defendant Broderick Jones has fabricated evidence to charge citizens with drug offenses. Each bogus arrest follows a similar pattern: Jones and his partner arrest a suspected drug dealer; if a search fails to turn up any contraband, the officers plant drugs on or about the arrestee and claim that they had observed the arrestee make several drug sales. The City is aware of Jones' misconduct because he has been the subject of numerous citizen complaints about planting drugs. Plaintiff's claim of municipal liability is that officer Jones was able to engage in this wrongdoing because of the deliberate indifference of defendant City of Chicago to the fabrication of evidence by its police officers.
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> *Wiley v. Chicago,* 7th Cir., No. 03-1490, Brief of Appellant at 3.

The Seventh Circuit rejected the district court's interpretation of *Heck v. Humphrey, supra.* (Pet.App. 2a-5a.) The Court of Appeals held, however, that respondent could not maintain a federal claim for "wrongful prosecution," (Pet.App. 5a), and concluded that respondent's Fourth Amendment claim was limited to one for false arrest. Id. The Seventh Circuit applied its decision in *Gauger v. Hendle,* 349 F.3d 354, 361 (7th Cir. 2003), to hold that the damages recoverable on a false arrest claim stop when the arrestee is arraigned or formally charged. (Pet.App. 6a.) The Court of Appeals rejected respondent's reliance on the Fourth Amendment theories discussed by Justice Ginsburg in her concurring opinion in *Albright v. Oliver,* 510 U.S. 266 (1994), (Pet.App. 5), and held that respondent had waived his federal claim against the City of Chicago because he had

"failed to advance it on appeal."[6] (Pet.App. 6.) Respondent's timely petition for rehearing was denied without opinion. (Pet.App. 8.)

ARGUMENT

The petition in this case and the cross-petition in No. 03-1687 present, from opposing perspectives, questions that have divided the Courts of Appeals in applying *Albright v. Oliver*, 510 U.S. 266 (1994) and *Heck v. Humphrey*, 512 U.S. 477 (1994) to wrongful prosecutions.[7] Resolution of these questions is important both to the municipalities that are financially responsible for the wrongdoing of their police officers and to persons, like respondent, who were framed and then wrongfully prosecuted.

Petitioner argues that when a person is arrested and prosecuted after he (or she) has been framed by a police officer, the "Fourth Amendment's applicability is at an

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6. The opinion of the district court made plain that the City had not "contest[ed] plaintiff's 'policy' allegations." (Pet.App. 9a.) The ordinary rule of appellate procedure is that an appellant need not seek review of an issue that had been conceded in the lower court and it unclear how the Seventh Circuit expected this non-issue to have been "advanced" on appeal. Respondent seeks review of this novel waiver rule in his cross petition, No. 03-1687.

7. We use the phrase "wrongful prosecution" to differentiate respondent's constitutional claims from the common law torts of false arrest and malicious prosecution. See *infra* at 9-12.

end once the arrestee is charged with an offense." (Pet. 14.) In petitioner's view, a person arrested as part of a police frame-up cannot await dismissal of the bogus charges lest his (or her) claim be barred by the statute of limitations; petitioner argues that a claim for damages from a police frame-up accrues immediately upon arrest and that the victim of the frame-up must immediately file a Section 1983 action for damages "while memories are still fresh and critical witnesses and documents are still available." (Pet. 21.)

Neither of these questions has been squarely resolved by the Court.

-I-

In her concurring opinion in *Albright v. Oliver,* 510 U.S. 266 (1994), Justice Ginsburg suggested two ways in which the Fourth Amendment applied when a person is framed by a police officer. The first has become known as the "continuing seizure" theory, that "[a] person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip." Id. at 279 (concurring opinion). Under this theory, a person who is required to answer criminal charges that arise from a police frame-up is subjected to a "continuing seizure" until the favorable resolution of the criminal charges, when he (or she) would be entitled to seek compensation under Section 1983 for post-arrest damages.

The "continuing seizure" theory, which was endorsed by two other Members of the Court in *Albright,* 510 U.S. at 307, (Stevens, J., joined by Blackmun, J., dissenting), has been adopted without reservation by the

Fourth and Ninth Circuits,[8] and is used by the First, Third, and Eleventh Circuits as the framework for deciding whether conditions of pre-trial release constitute a seizure.[9] The "continuing seizure" theory, however, has been "repeatedly rejected" by the Seventh Circuit (Pet.App. 5a), and has been rejected in *en banc* decisions by the Fifth and Eighth Circuits.[10]

The second approach set out by Justice Ginsburg in her concurring opinion in *Albright* turns on a police officer's post-arrest actions, such as providing false information at the post-arrest judicial determination of probable cause required by *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975). If a police officer provides false evidence at a *Gerstein* hearing, "that testimony served to maintain and reinforce the unlawful haling of [the arrestee] into court, and so perpetuated the Fourth Amendment violation." 510 U.S. at 279. Liability for providing such false evidence would be consistent with *Franks v. Delaware,* 438 U.S. 154 (1978), where the

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8. *Lambert v. Williams,* 223 F.3d 257 (4th Cir. 2000); *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1127 (9th Cir. 2002).

9. *Nieves v. McSweeney,* 241 F.3d 46, 54 (1st Cir. 2001); *Gallo v. City of Philadelphia,* 161 F.3d 217, 222 (3d Cir. 1998); *Kingsland v. City of Miami,* 369 F.3d 1210, 1222 (11th Cir. 2004).

10. *Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (en banc). *Moran v. Clark,* 296 F.d 638, 647 (8th Cir. 2002) (en banc)

Court held that the Fourth Amendment "would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." Id. at 168. This is the "wrongful prosecution" theory that respondent advanced in the court below. (*Wiley v. Chicago,* 7th Cir., No. 03-1490, Brief of Appellant at 2, 5-6, 10-14.)

The injury resulting from a prosecution that is based on fabricated evidence or on a police officer's false statements may also be analyzed on a Fourteenth Amendment Due Process theory.[11] This is the approach followed in the Second, Fifth, Sixth, and Eighth Circuits, which view the injury resulting from a police frame-up as a denial of due process.[12]

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11. Respondent advanced the Due Process theory as an alternative argument in the court of appeals. (*Wiley v. Chicago,* 7th Cir., No. 03-1490, Reply Brief of Appellant at 5.) Petitioner argues in his brief in opposition in No. 03-1687 that respondent waived his due process argument by making his argument in the alternative. (Br.Opp., 03-1687, 8.) This claim of waiver is without merit: respondent neither waived nor abandoned his Due Process argument by urging the Seventh Circuit to resolve his claim on Fourth Amendment grounds. Cf. *Cline v. Kaplan,* 323 U.S. 97, 100 (1944) (objection to disposition of claim by summary procedure not waived by participating in proceedings).

12. *Zahrey v. Coffey,* 221 F.3d 342 (2d Cir. 2000) *Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (en banc); *Stemley v. City of Florence,* 126 F.3d 856, 872 (6th Cir. 1997), *opinion following remand,* 350 F.3d 578 (6th Cir.

A Fourth Amendment "wrongful prosecution" claim differs from the common law tort of malicious prosecution.[13] A claim for "wrongful prosecution" begins with a police officer's misconduct in fabricating evidence or making false material statements. A "wrongful prosecution" does not require active involvement by the police officer in the institution of the criminal prosecution, as would be required for the tort of malicious prosecution.[14] Nor does a "wrongful prosecution" require malice

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2003) (fabrication of evidence, acquittal, due process theory); *Moran v. Clark,* 296 F.d 638, 647 (8th Cir. 2002) (en banc) *Cf. Pierce v. Gilchrist,* 359 F.3d 1279, 1293 (10th Cir. 2004) (fabricating evidence actionable as a "due process/fair trial deprivation" or as Fourth Amendment violation)

13. Respondent advanced this distinction in his briefs in the court of appeals and at oral argument in the court below expressly disavowed the theory that the common law tort of malicious prosecution was available in an action brought under Section 1983. (Pet.App. 6a.)

14. The six elements of malicious prosecution were set out by the Illinois Supreme Court in *Glenn v. Lawrence,* 280 Ill. 581, 585, 117 N.E. 757, 759 (1917):

    1. The commencement or continuance of an original criminal or civil judicial proceeding;

    2. Its legal causation by the present defendant against plaintiff, who was defendant in the original proceeding;

    3. Its bona fide termination in favor of the present plaintiff;

    4. The absence of probable cause for such proceeding;

— there is no state of mind element in Section 1983 actions beyond that necessary to state a violation of the underlying constitutional right. *Parratt v. Taylor,* 451 U.S. 527, 534-45 (1981).

The Seventh Circuit stands along in holding that the victim of a wrongful prosecution is entitled to damages "limited to the harm that he incurred from the false arrest before he was charged." *Gauger v. Hendle,* 349 F.3d 354, 361 (7th Cir. 2003) This is the rule that the court of appeals applied in this case. (Pet.App. 5a-6a.) In the view of the court of appeals, this rule is required because "the Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions." *Gauger,* 349 F.3d at 361.

A police frame-up that results in a wrongful prosecution is different from a common law claim of false arrest. The gist of a frame-up claim is that the officer has fabricated evidence, e.g., by planting contraband or by lying about visual observations. In contrast, a false arrest claim does not require any evidence of wrongdoing; the claim is simply "that the defendant acted without having reasonable grounds to believe that an offense was committed by the plaintiff." *Meerbrey v. Marshall Field and Co., Inc.,* 139 Ill.2d 455, 474, 564 N.E.2d 1222, 1231 (1990). A frame-up claim arises from active

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5. The presence of malice therein; and

6. Damage resulting to the plaintiff.

wrongdoing by the arresting officer; a false arrest claim arises from a mistake in judgment. A judicial determination of probable cause which is not based on false material statements cures any injury that resulted from a false arrest; the same cannot be true when the judicial finding of probable cause is based on police perjury.

The damages that are proximately caused by a wrongful prosecution are different than those recoverable because of a false arrest.[15] Damages for a false arrest end when there has been a judicial determination of probable cause; damages for a wrongful prosecution would include compensation for the injury of being required to defend bogus criminal charges, as well as compensation for any imprisonment, discomfort, or injury to health, loss of time and income, deprivation of society, and loss of reputation.

The various legal theories that have been crafted in an attempt to provide a federal remedy for wrongful prosecutions have been plagued by "imperfect" analogies, *Wilson v. Garcia*, 471 U.S. 261, 272 (1985), to

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15. Petitioner, as respondent in No. 03-1687, offers the remarkable argument that respondent waived any challenge to the Seventh Circuit's limitation on damages on a wrongful prosecution claim when, in his brief in the court below, he accurately described the damages recoverable on a common law false arrest claim. (Br.Opp., No. 03-1687, 11.)

common law torts.[16] This case — taken together with the cross-petition in No. 03-1687 — provides an appropriate vehicle for the Court to adopt a clear standard for the cause of action arising from the deprivation of Fourth Amendment rights caused by a wrongful prosecution.

-II-

Petitioner's assertion that a Section 1983 action for damages caused by a police frame-up accrues upon arrest, rather than upon the favorable termination of criminal proceedings, reflects what petitioner accurately describes as the "considerable confusion," (Pet. 7), that has resulted from footnote 7 in *Heck v. Humphrey,* 512 U.S. 477 (1994).[17]

In *Heck v. Humphrey,* a convicted felon filed a Section 1983 action against the prosecutors and a police investigator, asserting that these persons had wrongfully caused his conviction. The Court held that the damages action could not proceed until and unless the conviction was set aside. The rule of *Heck v. Humphrey* is that "a

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16. Such "imperfect analogies" appear throughout the amicus brief of the City of New York (filed in No. 03-1687), where respondent's wrongful prosecution claim is repeatedly referred to as a "false arrest claim." (Brief Amicus Curiae of the City of New York, No. 03-1687, 1-3.)

17. Petitioner is mistaken in arguing (Pet. 17), that the Court resolved this confusion in *Nelson v. Campbell,* 124 S.Ct. 2117 (2004). See *infra* at 14-15.

1983 action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." 512 U.S. at 490.

Petitioner correctly points out that the lower federal courts have followed different approaches in applying *Heck* to claims brought by persons, like respondent, who were never convicted of an offense.[18] (Pet. 6-11.) These divergent approaches are the result of attempts to apply footnote 7 in *Heck*. 512 U.S. at 487 n.7

Footnote 7 in *Heck* illustrated a situation in which a Section 1983 action "even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff." (emphasis in original) The note states as follows:

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18. Petitioner correctly points out that the courts of appeals have uniformly held that *Heck* applies to "claims brought by persons facing pending criminal charges when the suit, if successful, would necessarily invalidate a potential conviction on the pending charges." (Pet. 5.) Amicus City of New York argues (in No. 03-1687) that *Heck* does not apply in cases "where the criminal charges had been dismissed without a trial." (Brief of City of New York, No. 03-1687, 5.) This case does not provide an appropriate vehicle to answer this additional question because the criminal charges against respondent were dismissed after a finding of not guilty at a trial See *ante* at 2 n.4.

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, see *Murray v. United States*, 487 U.S. 533, 539 (1988), and especially harmless error, see *Arizona v. Fulminante*, 499 U.S. 279, 307-308 (1991), such a §1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the §1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, see *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986), which, we hold today, does not encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Footnote 7 does not address the recurring fact situation presented in this case when an unlawful arrest results in a prosecution without a conviction. The result of applying footnote 7 to this scenario is, as petitioner points out (Pet. 10-12), a split among the circuits.

Petitioner is mistaken in arguing (Pet. 17) that *Nelson v. Campbell*, 124 S.Ct. 2117 (2004) resolved this conflict. *Nelson* involved a claim advanced after conviction; the Court explained that footnote 7 in *Heck* upheld the right of Section 1983 plaintiffs to being civil rights claims that would not undermine the conviction: "To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff never obtain favorable termination—suits that could otherwise have gone

forward had the plaintiff not been convicted." 124 S.Ct. at 2124. Nothing in *Nelson* addresses whether a damages action must be brought when the suit, if successful, would undermine a criminal prosecution.

Notwithstanding the real conflict among the circuits about footnote 7 in *Heck*, it does not appear that any circuit would hold that a claim of police frame-up accrues before the favorable termination of the criminal prosecution.[19] As Judge Posner explained in *Robinson v. Doe*, 272 F.3d 921 (7th Cir. 2001), success on such a claim would necessarily undermine any conviction:

> The plaintiff claimed that he'd been framed; that the police who arrested him for supposedly selling heroin to them had really come to purchase not heroin but gems, which they subsequently stole from him and then fabricated the tale of his selling them heroin. The testimony of the police that they had bought heroin from the plaintiff was essential to this conviction, yet had he proved his false-arrest case the

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19. Two of the circuits which hold that Fourth Amendment claims accrue upon arrest recognize an exception for frame-up cases. *Nieves v. McSweeney*, 241 F.3d 46, 52 n.4 (1st Cir. 2001), (some "section 1983 claim[s] based on a warrantless arrest will not accrue at the time of the arrest); *Laurino v. Tate*, 220 F.3d 1213 (10th Cir. 2000) (*Beck v. City of Muskogee Police Department*, 195 F.3d 553 (10th Cir. 1999) does not apply where all the evidence to be presented was obtained as the result of an illegal arrest." 195 F.3d at 559 n. 4.)

testimony would have been completely discredited.

Robinson v. Doe, 272 F.3d at 923.

In our view, there should be a bright line rule of accrual when damages are sought against police officers on a claim of wrongful prosecution: The appropriate rule should be that the wrongful prosecution claim accrues when the criminal prosecution has been resolved in favor of the civil rights plaintiff.

CONCLUSION

The petition in this case and the cross-petition in No. 00-1687 present, from opposing perspectives, important questions that have divided the Courts of Appeals and which should be resolved by this Court.

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